

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re: David Alan Kuchinka,
Myrtle LaCheryl Kuchinka,

Debtors.

Larry J. McClatchey, Trustee.

Plaintiff,

v.

Algene Kuchinka, et al.,

Defendants.

Case No. 02-66904

Chapter 7

Judge Caldwell

Adversary No. 03-2427

MEMORANDUM OPINION AND ORDER

This Memorandum Opinion and Order constitutes the findings of fact and conclusions of law for the adversary proceeding commenced by Larry J. McClatchey, Chapter 7 Trustee ("Plaintiff"). The Plaintiff seeks to avoid two transfers as preferential under section 547(b) of the United States Bankruptcy Code ("Code"), and to recover their value under section 550 of the Code. They include the transfer of forty head of cattle from David Kuchinka ("Debtor") to his father Algene Kuchinka, et al. ("Defendant"), and a \$3,000.00 cash payment from the Debtor to the Defendant related to alleged timber sales. The Court has concluded that the Plaintiff has established entitlement to the avoidance of the two transfers. A brief history of this case will illustrate the bases for this decision.

The Defendant made a series of loans to his son, the Debtor, dating back at least to 1991. These transactions were recorded by the Defendant in a "David Kuchinka Farm Loan Ledger" ("Ledger"). Regarding the cattle transfer, the Defendant was purchasing a farm in Tennessee for \$100,000.00, and only had \$44,000.00. He was scheduled to close on the property on October 1, 2001, and needed the sum of \$56,000.00 he loaned the Debtor. On September 29, 2001, the Debtor paid the Defendant \$20,000.00 in cash, and the Defendant recorded this payment in the Ledger on that same day.

For repayment of the balance, the Defendant and the Debtor arranged to transfer forty head of cattle to the Defendant. The Defendant borrowed the remaining funds from his credit card, and closed on the farm. The Defendant agreed to buy the cattle for \$850.00 per head. In exchange, he credited the Debtor the sum of \$34,000.00 in the Ledger. Unlike the \$20,000.00 cash payment that was recorded contemporaneously and while both the Defendant and the Debtor were aware of the need to complete the real estate transaction, the cattle transfer was not recorded in the Ledger until March 31, 2002, - approximately six months later. This inconsistency casts serious doubt on the credibility of the Defendant's assertion that the cattle transfer took place in September, 2001.

The Defendant and the Debtor testified that the fair market value of the cattle at the time was \$700.00 per head. According to their testimony, however, they agreed to a price of \$850.00 per head, because the Debtor continued to care for the cattle at the Ohio farm. They were not physically transferred to the Defendant's Tennessee farm until April or May, 2002. Although the cattle were in the Debtor's care, and a premium was allegedly paid, the Defendant defrayed all expenses, including veterinary fees, supplies, and transportation costs.

As a result, according to the Defendant's testimony, he paid twice for the maintenance of the cattle. Such action appears inconsistent with the Defendant's assertion that the cattle were transferred in September, 2001, but rather suggests to the Court that the cattle transfer actually took place at the time of the March, 2002, entry in the Ledger.

The Debtor testified that during April and May of 2002, he took five trips to transfer the cattle from the Ohio farm to the Defendant's farm in Tennessee. The Debtor testified that the heifers had blue ear tags, and the cows had yellow ear tags. The ear tags were numbered. The record indicates that the Debtor had as many as 122 head of cattle in his herd, but it does not appear that the numbers were recorded. Also, the portion of the herd that was transferred to the Defendant does not appear to have been segregated prior to delivery.

Turning to the recovery of the \$3,000.00 cash payment, the Defendant testified that the Debtor was to collect funds from the timber sales on the Defendant's Ohio farm as an agent. Specifically, the record indicates that the Debtor was entitled to forty to fifty percent of the timber sale proceeds, and was obligated to deliver the balance to the Defendant. The Defendant testified that on occasion buyers would send a check directly to him, while others paid the Debtor cash.

The record indicates that on September 30, 2002, the Debtor paid the Defendant \$3,000.00 in cash for alleged previous timber sales. The Defendant credited the Debtor's account in his Ledger for the \$3,000.00 on that same day. It appears from the Debtor's testimony, however, that he did not segregate his share of the timber sale proceeds. Further, when the Debtor retained the Defendant's portion of the timber sale proceeds, he would at

times use the money for his personal expenses.

Regarding the cattle transfer, the Court has concluded that the Plaintiff has established all elements for recovery as a preference, and that there is no applicable statutory exception to recovery. 11 U.S.C. § 547(b) and (c). The Defendant was one of the Debtor's creditors. According to the Ledger, at the time of the cattle transfer there was an outstanding obligation to the Defendant in the amount of \$49,647.98. The transfer of the cattle directly benefitted the Defendant by providing a means to reduce the substantial loan balance in the Ledger. 11 U.S.C. § 547(b)(1) and (2).

The testimony of the Debtor indicates that during the year prior to the filing, he was unable to meet his outstanding obligations, and he owed more than the value of his assets. 11 U.S.C. § 547(b)(3). According to the last interim report filed by the Plaintiff there are no other assets to be administered in this estate, and the Debtor scheduled a total of \$144,456.25 in general unsecured claims, the sum of \$18,000.00 in unsecured priority claims and the sum of \$214,199.47 in secured claims. On this basis the Court concludes that the transfer of the cattle enabled the Defendant to receive more than upon completion of this liquidation proceeding. 11 U.S.C. § 547(b)(5).

The Defendant challenges the recovery of the value of the cattle transfer on the theory that it occurred outside the one year window of recovery for insiders. 11 U.S.C. § 547(b)(4)(B). Specifically, the Defendant asserts that the transfer took place in September, 2001, when the parties orally agreed to the transaction to allow for the closing of the Tennessee farm scheduled for October, 2001. The Court finds and

concludes, however, that the applicable transfer date occurred approximately six months later on March 31, 2002. This is the date when the transfer was recorded in the Ledger. Indeed, the only written documentation for the cattle transfer is the March 31, 2002, Ledger entry. Further, the cattle were not physically transferred to the Defendant's farm in Tennessee until April and May, 2002.

The testimony of the Defendant and the Debtor are inconsistent with the only written record of the transaction. Their credibility on this point is diminished given the fact that the Defendant made the entries in the Ledger without any meaningful input from the Debtor, who apparently accepted them without any question or challenge. Such important details were left to the Defendant. Further, the Debtor's engagement in his own financial affairs appears to be minimal. At one point in his testimony at the trial he could not recall significant details of his own bankruptcy filing, including whether he signed the petition.

In addition to the inconsistencies and lack of credibility regarding the transfer date, when the transaction is examined in the context of the Ohio Uniform Commercial Code, the Court must also conclude that the applicable transfer date is the March 31, 2002, Ledger entry. This conclusion is reached based upon the fact that pursuant to Sections 1302.01(A)(8), 1302.42(A),(C)(2) and 1302.45(A)(1) of the Ohio Revised Code the cattle are considered goods, and title does not pass until the goods are identified.

In the instant case, the first time the cattle were identified was in the March 31,

2002, Ledger entry. Before that date the record is unclear as to whether the cattle at issue were in any way identifiable from the remaining portion of the Debtor's herd that totaled at least 122 head. Even if the transfer can be deemed to have occurred in September, 2001, such a transaction could be set aside because the Debtor retained possession after the alleged transfer date. O.R. C. § 1302.43(C)(2).

Regarding the applicability of any of the statutory defenses to the cattle transfer, the Defendant maintains that it was the ordinary practice of the parties to engage in transactions that were not recorded in the Ledger until months after the actual transfer took place when the parties would meet in person. The Defendant failed, however, to sustain his burden to establish that this practice is the standard within the industry. 11 U.S.C. § 547(c)(2) and (g) ; *Luper v. Columbia Gas of Ohio, Inc. (In re Carled, Inc.)*, 91 F.3d 811, 818 (6th Cir. 1996).

Regarding the cash transfer, as in the case of the cattle transfer, the Court concludes that the Plaintiff has established that there was a transfer of the \$3,000.00 in cash to the Defendant as a creditor on an antecedent obligation within the year prior to the bankruptcy filing. The Debtor was insolvent, and the transfer enabled the Defendant to receive more than under a chapter 7 liquidation. Further, it does not appear that any of the statutory exceptions are applicable.

Rather, the Defendant asserts that the funds were never property of the estate, but were instead held by the Debtor in trust for the Defendant as his agent. The record, however, does not support such an assertion. There is no trust document, or

ability to determine that the funds were separately identifiable or segregated. Indeed, the Debtor testified that he would on occasion use the proceeds from the timber sales, and would repay the Defendant later when he had more funds.

Accordingly, the Court has concluded that the Plaintiff has established entitlement to recovery pursuant to Sections 547(b) and 550 of the Code in the amount of \$37,000.00.

IT IS SO ORDERED.

Date: June 11, 2005

/s/ Charles M. Caldwell

Charles M. Caldwell

United States Bankruptcy Judge

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